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Wolf Street Supermarkets, Inc. d/b/a Jim's Big M; and Big M Supermarkets, Inc. and United Food and Commercial Workers, District Union Local 1. Case 3-CA-10203(E)

April 26, 1983

SUPPLEMENTAL DECISION AND ORDER

By Members Jenkins, Zimmerman, and Hunter

On January 21, 1983, Administrative Law Judge Joel A. Harmatz issued the attached Supplemental Decision on application for attorney's fees and expenses under the Equal Access to Justice Act (hereinafter EAJA). Thereafter, Applicant Wolf Street Supermarkets, Inc. d/b/a Jim's Big M filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions¹ and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

It it hereby ordered that the applications of the Applicants, Wolf Street Supermarkets, Inc. d/b/a Jim's Big M; and Big M Supermarkets, Inc., Syracuse, New York, for an award under the Equal Access to Justice Act be, and they hereby are, dismissed.

SUPPLEMENTAL DECISION ON APPLICATION FOR ATTORNEY'S FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

On September 30, 1982, the Board issued a Decision and Order in this proceeding affirming my findings that the Respondents, Wolf Street Supermarkets, Inc. d/b/a Jim's Big M (hereinafter called Jim's Big M) and Big M Supermarkets, Inc. (hereinafter called Big M Inc.), did not violate Section 8(a)(3) and (1) of the Act "by failure to hire employees of the former operator of a [unionized] retail grocery." Accordingly, the Board adopted the recommendation that the complaint be dismissed in its entirety.

Thereafter, Respondents on October 22 and November 1, 1982, separately filed with the Board their respective "Notice of Application for Fees and Other Expenses Incurred" pursuant to the Equal Access to Justice Act (Pub. L. 96-481, 94 Stat. 2325) and Section 102.143, et seq. of the Board's Rules and Regulations. By Order of the Board dated November 4, 1982, said applications were referred to me "for appropriate action." Thereafter, on November 17 and November 29, 1982, counsel for the General Counsel filed separate "Motion[s] To Dismiss Application for an Award of Fees and Expenses Under the Equal Access to Justice Act" as to Jim's Big M and Big M Inc., respectively. Both claimants filed "Responses" to the aforementioned "Motion[s] To Dismiss."2 Having duly considered the matter, it is hereby found as follows:

Dismissal of the application is urged on several grounds, including an assertion that both applications fail to state a cause for relief consistent with the requirements of Section 102.144(a) of the Board's Rules and Regulations which provides in material part as follows:

An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof . . . is on the General Counsel, who may avoid an award by showing that his position in the proceeding was reasonable in law and fact.

Consistent therewith Section 504(a)(2) of the Equal Access to Justice Act forecloses recovery "where the adjudicative officer finds that the position of the agency as a party to the proceeding was substantially justified."

It is noted in that regard that relief herein is sought by the Applicants in connection with dismissal of the following allegations:

(A) That Respondent, Jim's Big M, violated Section 8(a)(3) and (1) of the Act by refusing to hire

¹ In its exceptions, Applicant Jim's Big M argues, in substance, that a failure of the General Counsel to establish a prima facie case should automatically entitle an applicant to an award under EAJA. Contrary to the Applicant's contentions, we find that the presence or absence of a prima facie case is not determinative of whether or not an applicant is entitled to an EAJA award. Rather, the legislative history of EAJA states that the standard "is essentially one of reasonableness" and is not to be equated with "a substantial probability of prevailing." S. Rep. F96-253, at 6-7 (1979); H.R. Rep. No. 96-1418, at 10-11 (1980). Further, we have held that all EAJA applications shall be analyzed on a case-by-case basis. Enerhaul, Inc., 263 NLRB 890, fn. 3 (1982). As discussed by the Administrative Law Judge, the Board found that the evidence in the underlying case failed to establish a prima facie case based, in large part, on the absence of credited evidence of union animus by the Applicants. The Administrative Law Judge further pointed out, however, that if credited Anthony Pento's testimony relating to statements made by representatives of Applicant Big M that the new store would not be operated on a union basis would have been sufficient evidence of union animus to support a prima facie case. In these circumstances, we find that the position taken by the General Counsel was reasonable. See, generally, Enerhaul,

^a In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's recommendation to dismiss the application of Applicant Big M Supermarkets, Inc.

^{1 264} NLRB 1124.

² That of Jim's Big M was received on November 30, 1982; that of Big M Inc., on December 13, 1982.

eight former employees of a retail grocery store (Pento) based upon their union membership, and

(B) That Respondent, Big M Inc. (enfranchisor) committed like violations of the Act by influencing or causing Jim's Big M to engage in the aforementioned discrimination.

As against Respondent Jim's Big M, it was concluded in the foregoing respect that the General Counsel had satisfied the requirements of a prima facie case as set forth in Wright Line, 251 NLRB 1083, 1089 (1980). Said view was founded upon certain undisputed facts, including the following:

1. Jim's Big M was aware that the Pento employees had been historically represented by a Union.

2. Jim's Big M was to function utilizing skills typical of grocery operations, but declined to hire the experienced Pento employees.

Although all of Pento's employees filed applications, not one was granted an interview. In contrast, all other applicants with the exception of those hired who were personally known to Jim's Big M were granted interviews. Furthermore, Jim's Big M did not seek references or otherwise make inquiry as to the ability and work reputation of the Pento employees.

In adopting the ultimate recommendation of dismissal, the Board disavowed the finding that a prima facie case had been established,3 noting the absence of a showing of "union animus." However, it must be noted that such evidence was not lacking in the presentation of the General Counsel. For Pento, the former operator of a grocery store at the location in question, imputed statements to Vincent Genecco and John Palange, both of whom were representatives of Big M Inc., to the effect that the new store would not be operated on a union basis. Although the testimony of Pento was viewed as incredible, it, together with the facts outlined above, offered strong justification for proceeding with the instant charges of discriminatory refusal to hire. This is particularly so when considered in the context of evidence suggesting that Big M Inc. and Jim's Big M combined to operate a franchise store on a nonunion basis by discriminatorily denying employment to the Pento employees. Thus, in addition to the franchise relationship existing between them, Jim's Big M acquired the Pento location through Big M Inc.'s ouster of Pento and its determination that Jim's Big M was an acceptable replacement. Additionally, Big M Inc. was actively involved in preparation of the store for opening by Jim's Big M. Thus, a representative of P & C Food Markets Inc. 4 aided Jim's Big M in the formulation of renovation plans, and P & C employees, as well as those of Big M Inc., actually performed some of the renovation and preopening services on a cost-free basis. Finally, evidence disclosed that Big M Inc. involved itself in the actual hiring process. Thus, Big M Inc. provided its own standard employment applications for use by Jim's Big M. In addition, during the

initial hiring stages, the latter used the mailing address of Big M Inc. in soliciting applications. For its part, Big M Inc. not only distributed and received completed applications but actually referred jobseekers to Jim's Big M. Considering the foregoing, in the light of the union animus evident in the above-described testimony of Pento, it was not unreasonable to assume that the shared interest of the enfranchisor and franchisee in the success of the new venture provoked a cooperative effort to unlawfully avoid unionization. This view was buttressed by the fact that the professed disinterest by the franchisee, Jim's Big M, in the employment of Pento's unionized employees, if not an implementation, was nonetheless in complete harmony with the antiunion remarks ascribed by Pento to representatives of Big M Inc. Had Pento been credited, it is doubtful that this would have been lightly dismissed as mere coincidence.

Apart from the animus evident from Pento's testimony, it is also worthy of note that the claim that Pento's employees were discriminatorily denied employment is not refuted by an objectively founded explanation. Thus, the defense to the refusal to hire Pento employees was founded, exclusively, upon uncorroborated state of mind testimony of a self-serving nature. Nonetheless that evidence was deemed believable and hence furnished the sole basis for dismissal under my view that the uncontroverted evidence outlined above gave rise to a prima facie inference of discrimination. Even though this latter view was rejected by the Board, it was not deemed totally lacking in reason. Yet, it was this disagreement as to the quantum of proof necessary to shift the burden to Respondents, combined with my strong distrust of Pento, that produced a somewhat slender, and still not free from doubt, basis for dismissal herein.

With this in mind it is noted that pursuant to the Equal Access to Justice Act "the test of whether the Government's position is substantially justified is essentially one of reasonableness in law and fact." H.R. Rep. No. 96-1434 at 22 (1980). See also Enerhaul, Inc., 263 NLRB 890 (1982); Wynadotte Savings Bank v. NLRB, 682 F.2d 119 (6th Cir. 1982). As stated by Representative Smith of Ohio, who managed the Bill through conference, the Government is not to be deemed liable for attorney fees and expenses "when advancing in good faith a close question of law or fact." From my perspective with respect to the entire proceeding, maintenance of the allegations with respect to both Respondents depended upon difficult issues of credibility and fell deeply within permissible standards for governmental action, and hence the cause maintained herein was "substantially justified."5

Accordingly, as no material issue of fact arises under the instant applications, and it being clear on the entire record that counsel for the General Counsel has refuted any substantial foundation for claim under the Equal Access to Justice Act herein, the motions to dismiss shall be granted and the claims for attorney's fees and expenses on behalf of both Respondents shall be dismissed.

^a See 264 NLRB 1124, supra at fn. 2.

⁴ Big M Inc. is a wholly owned subsidiary of P & C.

⁵ The substantiality of this defense makes it unnecessary to consider the remaining grounds on which the General Counsel relies in urging dismissal of Respondents' applications herein.

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ORDER

It is hereby ordered that the applications for attorney's fees and expenses filed by Respondents pursuant to the

Equal Access to Justice Act and Section 102.143, et seq. of the Board's Rules and Regulations are hereby dismissed.

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